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FISCAL IMPACT REPORT

ORIGINAL DATE 02/09/11

SPONSOR Egolf LAST UPDATED _____ HB 194

SHORT TITLE Requirements for Government Contracting SB _____

ANALYST Archuleta

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	*See Fiscal Impact	*See Fiscal Impact	*See Fiscal Impact			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

State Investment Council (SIC)

General Services Department (GSD)

Department of Information Technology (DoIT)

Energy, Minerals and Natural Resources Department (EMNRD)

New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 194 requires potential contractors with a state agency to register with GSD and provide information that will be disclosed publicly, including:

- Name of the business
- Principals of the business
- Affiliated business entities
- Name and address of a contact person for the business
- Any contracts the prospective contractor currently has with a state agency, including term and amount
- A campaign contribution disclosure statement

The campaign contribution statement must disclose all contributions given by any principals of the company/contractor to a state public officer of the office soliciting the contract during the two years prior, if the total amount is greater than \$250 during that period. In addition:

- The state agency issuing the contract will require its procurement officer (or designee) to

review the disclosure statement and assert that contractor is properly registered with GSD and has disclosed relevant contributions, and further that no conflict of interest appears to exist between the prospective contractor and the agency, and that no undue influence has been applied in the awarding of said contract. Updates to this disclosure must be filed within 30 days.

- Principals of a contractor may not contribute or solicit a contribution for a state public officer of the respective state agency during the procurement process, nor during the term of the contract should it be awarded to the prospective contractor.
- State agencies will be required to disqualify prospective contractors found to be in violation of this disclosure requirement, and awarded contracts may be terminated if a contractor fails to update the disclosure statement or makes/solicits prohibited contributions.
- Contractors have a 30 day grace period to request reimbursement for contributions ‘inadvertently’ given to prohibited recipients. Contributions older than 60 days cannot be viewed as inadvertent.
- These disclosures and prohibitions of campaign contributions are applied relative to any contracts over \$20,000 or professional services contracts in excess of \$50,000 over any fiscal year.

The bill also amends Section 13-1-112 NMSA 1978 relative to competitive sealed proposals through RFP, requiring that applicants in the RFP process make the same contribution disclosures and as those required in section 1 of HB194.

Lastly, section 3 of HB194 repeals Section 13-1-191.1 NMSA 1978, which currently applies to disclosure requirements of RFP respondents.

FISCAL IMPLICATIONS

SIC identifies no specific costs related to the level of reporting required in the bill. For any contracts over \$50,000 the SIC requires extensive reporting, transparency and disclosure statements under its Disclosure and Transparency Policy. SIC policy also has additional penalties regarding investments made by the SIC, where contractors who fail to reveal or properly disclose campaign contributions that are subsequently discovered will be required to return all investments, fees and an additional penalty to cover lost investment opportunity cost.

NMCD indicates there would probably be no fiscal impact to the agency. However, if the Department must terminate a prospective contract or exercises its authority to terminate some of its contracts pursuant to this law, it may incur minimal to moderate additional expenses in re-initiating a new procurement process for the goods or services in question.

EMNRD suggests that for items whose procurement is solely based on a low bid, this bill may cause low bids for materials, construction, etc. to be considered unresponsive if the contractor fails to fill out the disclosure statement. This primarily is due to the requirement that a disclosure or update to disclosure information is required prior to responding to a solicitation (Section 1.B). If the disclosure statement was required to be on file with the GSD before entering into a contract with a state agency or local public body, the same information would be gathered without the possibility of impacting the bid process by unnecessarily removing bidders in the event of non-compliance. The overall fiscal impact to the state will vary widely depending on the contracting community and its ability to comply with this requirement.

SIGNIFICANT ISSUES

GSD cites the following issues:

Significant effort will be required to implement the intent of this bill. Currently the State does not require advanced registration for contractors to submit bids or proposals, and as a result no contractors are currently registered. The development of a complete process to capture pertinent information will be required.

A database of registered vendors and their contribution/status will be necessary and the data will require access by all appropriate procurement personnel. The state purchasing division website would be the most appropriate location to house the data. However, the state purchasing division does not currently have the personnel or website expertise to create and maintain the database and will require technical support related to web site construction.

Pending completion of large numbers of contractors being registered, solicitations will not have the level of competition that is desired. Performing registration for the procurements of all state procurement entities will be a very significant, time critical effort.

EMNRD cites the following issues:

GSD does not handle all procurements (state agencies handle professional services procurement, public works construction contracts, and services contracts under \$20,000), the state agency will have to request the disclosure forms from GSD, which may delay the procurement process.

Section 1.L considers a contract to be an agreement entered into through a request for proposals or invitation to bid having a value above \$20,000, a combination of such agreements having a value greater than \$20,000 in a fiscal year, or a contract for professional services greater than \$50,000. This may be a problem when considering suppliers of materials whose aggregate of transactions with an agency throughout a given fiscal year may exceed \$20,000. Since many agencies may use the same supplier for a product but numerous organizations within the agency are conducting the transaction, it is difficult for agencies to ensure that when and if this \$20,000 threshold is met, the reporting requirements are met. For example, one agency with many different internal organizations may buy off a price agreement for industrial or janitorial supplies. The agencies will have to develop some internal mechanism to ensure that when the \$20,000 threshold is met, the contractor has filed a disclosure statement prior to entering into another purchase agreement with the contractor.

Section 1.I says that a state agency “may” terminate a contract if the contractor fails to update a fully completed disclosure or if the contractor contributes or solicits for contributions during the term of a contract (Section 1.G). This presents the question of if a contractor violates the terms of Section 1.G, the agency has an option of continuing the purchase or contract, and, if the agency elects to continue the contract, there would be no repercussions against the contractor for this violation. If the agency entered into a construction contract for one year for construction of a facility of \$20,000 in value and it

was identified that the contractor violates Section 1.G, the agency would have to decide whether to terminate the contract in mid-construction. If the agency decided to terminate the contract, this could lead to significant delays in capital outlay projects and significant cost increases (both on the price of the contract and in administrative time lost) if the project was required to be rebid for completion. In this case, the agency would need to obtain the services of an architect or engineer to create a new plan set reflecting the current status of the project and require the agency to go through the procurement process again in order to complete the project.

For a contract solicited by invitation to bid, the Procurement Code (NMSA 1978, Section 13-1-108) already requires that the contract be awarded to the lowest responsible bidder. There are no subjective evaluations of a contractor aside from price and therefore including this type of procurement appears unnecessary.

PERFORMANCE IMPLICATIONS

GSD suggests that additional steps will be necessary for contractors prior to submitting bids and proposals and as a result a delay in contract solicitation and issuance may occur.

EMNRD also suggests that there may be instances where an agency will experience delays or may incur significant cost increases during capital outlay projects.

ADMINISTRATIVE IMPLICATIONS

There is a potential for an indeterminate amount of additional administrative burden to be caused to SIC by this bill, due to additional disclosures and monitoring required for small contracts.

GSD procurement officials will need training for validation of contractor status prior to soliciting and/or awarding contracts. Delay in contract solicitation and issuance will occur. Maintenance of the data from the entire state will likely take 2 FTE.

NMCD indicates department employees will have to carefully check the GSD website to review the contributions and disclosures made by prospective contractors during its procurement processes, and will then have to make the certifications required by this bill. The Department should be able to absorb these administrative burdens with current staff, although this might prove to be onerous or very burdensome if the Department ever has a high vacancy rate for its procurement specialists.

Agencies will need to develop internal tracking mechanisms to ensure that when an aggregate of purchases from a single vendor exceeds \$20,000, the prospective contractor has filed the disclosure statement with GSD.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 31

OTHER SUBSTANTIVE ISSUES

GSD suggest there may be legal issues since there is no definition of what constitutes a conflict

of interest. Presently, attorneys who sign for legal sufficiency would not sign if a conflict of interest would arise with a potential contractor. This bill proposes the state purchasing agents to determine a conflict of interest which is a legal term, and to determine what situations constitute a conflict of interest. Also this bill proposes that potential contractors cannot exert “undue influence” on the state purchasing agent. This already exists in the criminal code and this bill does not make this concept a criminal offense. This bill just requires that a disclosure certifies no appearance of a conflict of interest and no undue influence. Presently, potential contractors cannot obtain a state contract if there already exists a conflict of interest and if they exert undue influence. This bill provides that the contractor disclose no appearance of a conflict of interest. GSD is uncertain of what can be gained by such a disclosure.

EMNRD indicates the bill defines a “solicitation” to include an invitation to bid, request for qualifications, a request for proposals or other request to enter into a contract, pursuant to the Procurement Code, or the initiation of a process to enter into a contract that is exempt from the Procurement Code pursuant to NMSA 1978, Section 13-1-98 through 13-1-98.2. Therefore, a prospective contractor could be required to file a campaign disclosure form for procurements that are not subject to the procurement code if a request for proposals or invitation to bid were used.

ALTERNATIVES

In order to reduce the burden of state agencies having to determine whether the prospective contractor has met the \$20,000 aggregate, the bill could be amended to require a disclosure statement for a contract for any amount entered into through a request for proposals or invitation to bid.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Contractors and prospective contractors will still have to disclose under the existing NMSA 1978, Section 13-1-191.1, whether they, a family member, or a representative of the business have made a campaign contribution to an applicable public official in the two years prior to the procurement being entered into.

DA/bym